COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Bay State Gas Company	)	**D.T.E. 05-27**

APPEAL OF HEARING OFFICER'S
RULING PERTAINING TO PROCEDURAL SCHEDULE

The Attorney General, pursuant to 220 C.M.R. § 106(6)(d)(3) and G. L. c. 30A, § 11, appeals the Hearing Officer ruling and procedural schedule established on June 10, 2005 ("Schedule") because the Schedule deviates drastically from the Department's rate case schedule averages of 2.3 days per witness for hearings[1] and 74 days before hearings begin.[2] This rate case is unusually complex, yet the Schedule does not allow the Attorney General sufficient time to conduct adequate discovery, to prepare adverse testimony, or to cross-examine witnesses effectively. The Schedule also does not recognize that Bay State Gas ("Company") has failed to respond to overdue discovery which is essential to the core of the Attorney General's examination of the case.

Outstanding motions by the Attorney General for bifurcation, depositions, premises entry and inspection, and oral argument that would aid in the orderly disposition of the case also remain unresolved. Furthermore, the Schedule was not accompanied by

[1] The calculation is based on AG Exhibit "A" to the procedural schedule (attached) and results from averaging the number of days divided by the number of witnesses for DTE 03-40, *KeySpan* (25 days, 12 witnesses), DTE 02-24/25, *Fitchburg* (15 days, 5 witnesses) and DTE 01-56, *Berkshire* (17 days, 10 witnesses) gas rate cases: (25/12 + 15/5 + 17/10) = 6.78 / 3 = 2.26 = 2.3 days per witness. This calculation is important because it shows the time actually used to examine and cross-examine rate case witnesses.

[2] This calculation is derived by summing the number of days from filing to the start of hearings and dividing the sum by three. Based on AG Exhibit A, that calculation for *KeySpan* (70 days), *Fitchburg* (80 days) and *Berkshire* (72 days) is: (70+80+72) / 3 = 74 days before hearings. This calculation is important because it shows the time actually used to conduct discovery prior to rate case hearings.

an adequate statement of reasons to explain why the Schedule should deviate from the Department's normal pattern. The Schedule constitutes an abuse of discretion prohibited by G.L. c. 30A, §§ 11(1) and (3), to the extent that the Schedule deprives the intervenors due process and their ability to adequately address the rate case issues.

I. BACKGROUND

On April 27, 2005, the Company filed its rate case, including a performance based rates ("PBR") plan, a steel pipe replacement cost recovery mechanism, a pension and post-pension benefit ("PBOP") mechanism, and the standard rate case issues. During the Department's June 2, 2005, procedural conference, the Attorney General submitted his proposed procedural schedule (AG Exhibit "A" attached) which would have permitted discovery to continue until June 28, allowed 24 days of evidentiary hearings beginning July 19, and required intervenor testimony be filed by July 22. The Attorney General and other intervenors emphasized during the June 2 conference the need for adequate discovery time to enhance administrative efficiency. See June 2, 2005 Tr. at 10, 43, 51-54. The Schedule requires the Attorney General and other intervenors to file their last round of discovery to the Company by June 20, 2005 and file intervenor testimony by July 8, 2005, even though the Company has delayed or failed to produce responses to much of the Attorney General's preliminary discovery. See June 2, 2005 Tr. at 27, 28, 31, 32 (The Company has failed to answer 177 discovery requests from the first seven sets of discovery by the Attorney General). The Hearing Officer's schedule also permits only 19 days of evidentiary hearings beginning July 5, 2005. Furthermore, the schedule set the Intervenors' reply brief due on a non-work day (Saturday, September 24, 2005).

II. STANDARD OF REVIEW

The Department's procedural rules provide the presiding officer with the discretion to make all decisions regarding the admission or exclusion of evidence or any other procedural matters that may arise in the course of the proceeding. 220 C.M.R. § 1.06(6)(a); *see also Western Massachusetts Electric Company*, D.T.E. 97-120-3, p. 6 (1998). Additionally, the Department's procedural rules provide that to the extent that it is deemed necessary and practical, the presiding officer shall establish a fair and detailed schedule for the proceeding, including, but not limited to, discovery, evidentiary hearings, and briefs. 220 C.M.R. § 1.06(6)(b); *see also Western Massachusetts Electric Company,* D.T.E. 97-120-3, at 6. A procedural schedule is within the discretion of a presiding officer, but that discretion is not unlimited and where a presiding officer abuses his or her discretion, the Department may overturn a ruling or decision of the presiding officer. See *Western Massachusetts Electric Company*, D.T.E. 97-120-3, pp. 1-12 (1998); *New England Telephone*, D.P.U. 90-206/91-66, pp. 9-11 (1991).

Every agency decision must be in writing or stated in the record, and all evidence upon which the Department relies for its conclusions must be offered and filed as part of the record. G.L. c. 30A, § 11(4). The decision must be accompanied by a statement of reasons for the decision, including determination of each issue of fact or law necessary to the decision. G.L. c. 30A, § 11(8); *Massachusetts Institute of Technology v. Department of Public Utilities & another*, 425 Mass. 856, 868 (1997).

III. ARGUMENT

A. The Procedural Schedule Departs From Department Precedent

This rate case is atypical because it involves several issues that go beyond the scope of the average rate case. Parties are required to review, in addition to the standard rate case issues, a PBR plan, a steel pipe replacement plan, and new reconciling mechanisms such as the annual base rate adjustment mechanism ("ABRAM") and PBOP mechanisms. Despite the incredibly complex and technical matters at issue, the truncated Schedule reflects shorter than average time frames. For example, the evidentiary hearings for the past three Department rate cases, D.T.E. 03-40, D.T.E. 02-24/25, and D.T.E. 01-56, began an average of 74 days after the case was filed. These cases averaged 2.3 days per witness. Applying these statistics to this case, the evidentiary hearing should begin on July 11, 2005 and given the 16 witness to be called,[3] evidentiary hearings should last approximately 37 days. The Schedule, however, does not reflect such precedent. June 2, 2005 Tr. at 26-27, 51-53. In order to ensure a full and fair review of this complex case, the Schedule must, at a minimum, accommodate these estimates based on precedent.

The Schedule cuts short the discovery phase of the case, the purpose of which is to allow all parties to collect information and narrow the scope of the issues with the intent of reducing hearing time. 220 C.M.R. §1.06 (6)(c)(1). Rather than allow the parties to fully examine the important issues during the discovery phase, the Schedule rushes the parties through discovery and into an abbreviated evidentiary phase of the

[3] The 16 witnesses include: 9 Company witnesses, 4 witnesses for the AG, 1 witness for DOER, 1 witness for the Unions, and 1 potential witness for KeySpan. This estimate does not include the 15 potential witnesses that may be called by MASSCAP et al.

case. The Schedule's 19 days of evidentiary hearings, three of which are designated as "clean up" days, represents just 51% of the 37 days Department precedent normally demands. The Commission should impose a procedural schedule that provides that the evidentiary hearings begin on July 11, 2005 and allows for at least 24, preferably 37 days of witness testimony.

B. The Hearing Officer's Ruling Constitutes An Abuse Of Discretion And Violates Due Process By Providing Intervenors An Insufficient Amount Of Time Within Which To Present Their Case.

The State Administrative Procedure Act, G.L. c. 30A, affords parties to adjudicatory proceedings before administrative agencies "reasonable opportunity to prepare and present evidence and argument." G.L. c. 30A, § 11(1). The Schedule does not provide sufficient opportunity and time within which to prepare and present arguments during the evidentiary hearings. For example, the Company retained R.J. Rudden Associates to study the leaks in its distribution system and provide options for a $300 million steel replacement program. R.J. Rudden Associates took six months to study the system, involving over 1,110 hours of work and costing $299,586.00. AG-IR-3-12(b). The Attorney General has designated his own expert to review the Company's distribution system, but will be allowed scant time to review the thousands of relevant documents. AG-IR-2-1, 2-10, 2-18; June 5, 2005 Company discovery status letter to Department (Company refuses to produce documents or state which corrosion related documents exists, but invites the Attorney General to look for them in numerous field offices and filing cabinets). The Attorney General will not have a reasonable opportunity to prepare and present evidence and argument, and no meaningful opportunity to cross-examine the Company's witnesses.

The Schedule also creates inefficiencies which must be reconciled in order to allow for the full and fair review of this complex case. First, several motions that would aid in the orderly disposition of the case remain outstanding.[4] 220 C.M.R. §1.06(7)(d)(1) ("[P]residing officer shall make all rulings promptly after submission . . .."). Through these motions, the Attorney General seeks to narrow the scope of issues raised in this case and make the evidentiary phase as efficient as possible. However, the absence of rulings on these motions compromises the intervenors' efforts to enhance administrative efficiency. The Attorney General requests that the Department issue rulings on all pending motions to facilitate the efficient and effective review of this complex case.

Second, not all parties are able to gain access to all relevant information in an efficient and timely manner as the Company has failed to respond to discovery in a timely manner. 220 C.M.R. §1.06 (6)(c)(1). It is the hearing officer's duty to "ensure that the information necessary to complete the record is produced without unproductive delays." 220 C.M.R. §1.06 (6)(c)(2). The Attorney General raised his concerns regarding the Company's overdue and non-responsive answers to discovery during the procedural conference. June 2, 2005 Tr. at 27-28. During the procedural conference the Hearing Officer ordered the Company to provide a list of documents relating to the steel pipe replacement plan by 5 PM June 3, 2005 and to provide all remaining responses to the Attorney General's discovery sets 1-7 by 5 PM June 6, 2005. June 2, 2005 Tr. at 28, 34, 35. The Company did not provide such a list and several responses remain unanswered. See Attorney General's Motion to Compel filed on June 15, 2005.

[4] Motions that are currently before the Hearing Officer are Motion to Bifurcate filed June 2, 2005, Motion for Depositions filed June 2, 2005, Motion for Oral Argument before the Commissioners filed on June 6, 2005 and Motion for Entry and Inspection filed June 10, 2005.

The Company's failure to respond, and the lack of any action to enforce the Hearing Officer's order, thwarts the discovery rules outlined in 220 C.M.R. §1.06(6)(c). See June 8, 2005, Letter Designating Witnesses. Moreover, the Schedule itself does not provide dates relating to the deadline for filing responses to information requests and objections to discovery requests and responses to those objections as required under 220 C.M.R. §1.06(6)(b)(1). The lack of discovery deadlines will likely cause unproductive delays and further inefficiencies in these proceedings. The Attorney General requests that the Commission impose discovery deadlines to ensure the timely response to discovery requests by the Company.

Third, the staggered briefing schedule forces intervenors to file first, with only ten days to file a reply to the Company. The Company has the burden of proof in this case, and should file its brief before or simultaneously with the intervenors, but not after. The Company has a distinct procedural advantage already by having months to prepare its case without statutory deadlines, and should not be granted the additional luxury of two additional weeks to prepare its initial brief. Under the Schedule, any delays in the hearings or delays in the Company responding to discovery will take time away from the period the intervenors have to prepare their briefs, with no corresponding impact on the Company's time to prepare its brief.

C. The Hearing Officer Provides No Statement of Reasons

The Hearing Officer failed to provide a statement of reasons regarding the procedural schedule, G.L. c. 30A, §11(8); *Massachusetts Institute of Technology v. Department of Public Utilities & another*, 425 Mass. 856, 868 (1997), simply stating that she based this schedule on the interests of the parties and the statutory deadline. There is

no explanation as to why such an expedited schedule is required or why it was necessary to depart from Department precedent. The Attorney General requests that the Commission provide an explanation containing findings of fact and law sufficient to support an expedited procedural schedule in this complex case.

D. The Commission Must Modify The Procedural Schedule

Finally, several dates provided in the procedural schedule require correction. First, the intervenors' reply briefs are due on September 24, which is a Saturday. Also, the outline does not list July 25 or 26 as hearing dates but has witnesses scheduled for those days on the calendar accompanying the schedule. The Attorney General requests that the procedural schedule be amended to address these issues.

IV. CONCLUSION

"[T]he function of the department is the protection of public interests and not the promotion of private interests." *Lowell Gas Light Company v. Department of Public Utilities*, 319 Mass. 46, 52 (1946). The Schedule does not afford the intervenors a reasonable opportunity to address the issues raised at the hearing or to adequately address the public interest for the Department. The Hearing Officer's ruling, therefore, constitutes an abuse of discretion, and the Commission should overturn that ruling and provide intervenors with more time to conduct discovery, file intervenor testimony, and cross-examine witnesses.

For these reasons, the Commission should revise the procedural schedule to permit the Attorney General and Intervenors to conduct discovery until at least June 28, file testimony by July 22, and provide 24 days of hearing commencing no sooner than July 11, 2005. The Department should permit intervenors to file briefs second or adopt

the briefing schedule suggested by the Attorney General. If the Commission keeps the current briefing order, then the Commission should require the intervenor reply briefs to be filed no sooner than ten calendar days after the Company files its initial brief.

Respectfully submitted,

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